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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GARVIN CYRILL HART, Defendant and Appellant.	E059298 (Super.Ct.No. INF057130) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Garvin Cyrill Hart was convicted of several theft-related felony and misdemeanor offenses after pleading guilty in 2007. He was placed on probation; however, after he violated the terms and conditions of his probation, he was sentenced to a total term of four years eight months in state prison. He completed his sentence and is now facing removal from the United States by federal immigration authorities due to his felony convictions. In order to remove the cause for his threatened deportation, defendant filed a petition for writ of error *coram nobis* and a motion to vacate his judgment of conviction and withdraw his plea, based on his counsel and the court's failure to properly advise him of the immigration consequences of his plea. The trial court denied defendant's motion.

On appeal, defendant argues that (1) the trial court abused its discretion in denying his motion to vacate his conviction; and (2) his counsel was ineffective at the motion to vacate hearing for failing to raise meritorious arguments on his behalf. We reject these contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[1]

On May 23, 2007, in case No. INF057130, defendant was charged with two counts of possession of stolen property (Pen. Code, § 496, subd. (a); counts I & III);[2] one count

[1] The factual background underlying the convictions is not relevant to the issues raised on appeal. We recount only the factual and procedural details that are pertinent to our resolution of the issues on appeal.

[2] All future statutory references are to the Penal Code unless otherwise stated.

of commercial burglary (§ 459; count II); one count of residential burglary (§ 459; count VI); one count of misdemeanor unlawfully displaying a license plate upon a vehicle not issued for such vehicle with intent to avoid compliance with vehicle registration laws (Veh. Code, § 4462.5; count IV); and one count of misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364; count V). As to counts V and VI, the information further alleged that defendant committed those offenses while he was released from custody prior to final judgment in another criminal action (former § 12022.1).

On October 1, 2007, as part of a plea to the court encompassing this case and case Nos. INF058965 and INF057786, defendant pled guilty to all counts and admitted that he committed count VI while he was released from custody in another criminal matter. At that time, the trial court noted that it had a plea form with defendant's name, signature, and initials on it, and asked defendant whether those initials and signature were his. Defendant responded in the affirmative. The court also inquired of defendant whether he understood the consequences of his plea, the rights he was waiving, and whether he was pleading guilty to all of the charges. Defendant again responded in the affirmative. The court also asked defendant whether he had sufficient time to speak with his lawyer. Defendant responded in the affirmative. The court then found a factual basis for the plea, after having read the preliminary hearing transcripts. In addition, the court found the pleas and admissions were knowingly, intelligently, freely, and voluntarily made. Defendant was thereafter immediately sentenced. The court suspended execution

of the sentence, placed defendant on probation, and ordered him to serve 365 days in county jail under a treatment program.[3]

Defendant subsequently violated the terms and conditions of his probation. On August 25, 2009, the court revoked defendant's probation, and sentenced him to a total term of four years eight months in state prison.[4]

Defendant was released from prison in April 2012. He was then taken into custody by Immigration and Customs Enforcement (ICE). On January 9, 2013, an immigration court ordered defendant removed from the United States.

Thereafter, in order to remove the cause for his threatened deportation, approximately six years after defendant pled guilty, defendant in pro. per. filed a motion to withdraw his plea/vacate his conviction and/or a request for a writ of error *coram nobis* on the ground that his trial counsel and the court failed to adequately advise him of the immigration consequences. In his motion, defendant asserted he should be allowed to withdraw his guilty pleas based on four grounds: by way of a petition for writ of error *coram nobis* as well as under sections 1018, 1192.5, and 1016.5.

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[3] Defendant received the same sentence in case No. INF058965, wherein he pled guilty to possession of stolen property and admitted to committing the crime while out of custody awaiting trial in another active felony case. The record does not contain information pertaining to case No. INF057786.

[4] The record does not contain the revocation of probation proceedings.

On May 13, 2013, the People filed an opposition to defendant's motion to withdraw his guilty plea and vacate his conviction.[5] In the opposition, the People noted defendant sought relief by way of a petition for writ of error *coram nobis*, and sections 1016.5, 1192.5, and 1018, and argued defendant's motion must be denied on all four grounds.

An attorney was thereafter appointed for defendant. A hearing on defendant's motion was held on July 17, 2013. At that time, defendant's attorney argued that defendant be allowed to withdraw his guilty pleas on one of several grounds: that defendant had not been fully advised of his immigration consequences by his trial counsel; that he filed the motion with all due diligence upon finding out he would be deported to Canada; and that the immigration consequences were never orally advised at the time of the plea hearing. The prosecutor acknowledged defendant sought relief based on several grounds, including under sections 1016.5 and 1018, and by way of a petition for writ of error *coram nobis*, and argued that defendant was not entitled to relief on any of his asserted grounds. The trial court denied defendant's motion on all three grounds, finding section 1016.5 did not apply because defendant was appropriately advised of his immigration consequences; section 1018 did not apply because defendant did not file his motion within six months of judgment; and a petition for writ of error *coram nobis* did

[5] It appears that the People only filed an opposition relating to case No. INF058965, and not in the instant case. However, it appears the trial court at the motion to vacate hearing considered the prosecution's written opposition.

not apply because there was no factual error for the court to consider. This appeal followed.

II

DISCUSSION

A. *Motion to Vacate Conviction*

Defendant argues the trial court erred in denying his motion to vacate his conviction because he pursued the matter with due diligence and he had not been properly advised by the court of his rights pursuant to section 1016.5. He further claims that the court never inquired if defendant read and understood the plea form and that he was prejudiced by the omission of the required advice.

The People respond that this court should dismiss the appeal because defendant never filed a motion pursuant to section 1016.5, but rather a nonstatutory motion to vacate the judgment or withdraw his plea and a petition for a writ of error *coram nobis*. In the alternative, the People argue that this court should reject defendant's claims because the record shows defendant was advised of the immigration consequences of his plea. The People also assert defendant failed to show he would not have pled guilty if he had been properly advised of the immigration consequences.

1. Dismissal of Appeal

A noncitizen who has been convicted of a felony based on a plea of guilty or nolo contendre, but who claims that he or she was not advised on the immigration consequences of his or her plea, has three possible remedies: (1) He or she can appeal

from the judgment, pursuant to section 1237, if the record reflects the facts on which the claim is based; (2) he or she can bring a statutory motion to vacate the judgment, under section 1016.5, which requires the trial court to advise the pleading noncitizen felony defendant of the potential immigration consequences of his or her plea, and requires that the plea be set aside if it fails to do so; and (3) he or she may petition for a writ of habeas corpus raising the issue of ineffective assistance of counsel, under theories approved in *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, and *In re Resendiz* (2001) 25 Cal.4th 230, abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370-371. (*People v. Kim* (2009) 45 Cal.4th 1078, 1094.) These are the only potentially available remedies.

In *People v. Villa* (2009) 45 Cal.4th 1063, the Supreme Court held that a defendant who is in federal custody but is no longer in state custody as a result of his earlier conviction is ineligible for relief by way of a writ of habeas corpus. In a companion case, *People v. Kim*, *supra*, 45 Cal.4th 1078, the court held that defendants in that situation are not entitled to have their convictions and pleas vacated by a writ of error *coram nobis*, because (among other reasons) statutory relief is available under section 1016.5. (*People v. Kim*, *supra*, at pp. 1103-1104.) Accordingly, a petition for writ of error *coram nobis*, based on a claim of ineffective assistance of counsel or a trial court's failure to advise the defendant of the immigration consequences of his or her plea, cannot be used to challenge a conviction or withdraw the plea. (*Ibid*.)

However, the People mistakenly believe defendant sought relief only by way of a petition for writ of error *coram nobis*. The record clearly shows that defendant sought to vacate his conviction based on several grounds, including under section 1016.5. In fact, at the hearing on defendant's motion, defense counsel, the prosecutor, and the court all acknowledged defendant sought relief on four different grounds, including under section 1016.5. Moreover, the trial court specifically denied defendant's motion under section 1016.5, finding the court's advice of the immigration consequences was appropriate pursuant to section 1016.5. For these reasons, we reject the People's assertion that the appeal must be dismissed because defendant never filed a motion under section 1016.5.

2. Denial of Motion to Vacate under Section 1016.5

Defendant initially argues that he acted with due diligence in filing his motion to vacate his conviction. He also argues that the trial court should have granted his motion to vacate his conviction under section 1016.5 because he had not been properly advised of the immigration consequences. He further claims that he was prejudiced by the court's improper advisement of the immigration consequences of the plea. Assuming, without deciding that defendant's motion was filed with due diligence, we find the trial court did not abuse its discretion in denying defendant's motion to vacate his conviction under section 1016.5.[6]

[6] We note that the trial court did not make a due diligence finding at the motion to vacate hearing.

Section 1016.5 requires that before a court accepts a plea of guilty or no contest, it must advise the defendant that if he or she is not a citizen, the conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization." (§ 1016.5, subd. (a).) It further provides that if "the court fails to advise the defendant as required" by that section and the defendant shows that the conviction may have adverse immigration consequences, the court must grant a motion to vacate the judgment and allow the defendant to withdraw the plea. (§ 1016.5, subd. (b).) To obtain that relief, a defendant must demonstrate that (1) the court failed to advise the defendant of the immigration consequences as provided by section 1016.5; (2) as a consequence of conviction, the defendant actually faces one or more of the statutorily specified immigration consequences; and (3) the defendant was prejudiced by the court's failure to provide complete advisements. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199-200 (*Zamudio*); *People v. Totari* (2002) 28 Cal.4th 876, 884.)

"An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. [Citations.] An exercise of a court's discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]" (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518; accord *Zamudio, supra*, 23 Cal.4th at p. 192.) The court, deciding whether the defendant has made a sufficient showing under section 1016.5, "is the trier of fact and . . . the judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the

resulting inferences. [Citation.]" (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533, superseded by statute as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207, fn.5.)

In the instant matter, the record contains a "Felony Plea Form," which advised defendant he faced a possible maximum term of 11 years 4 months for the admitted charges and enhancements, and was entering a plea that would result in execution of a suspended sentence and probation would be granted. Section B.3 of this form, entitled "Consequences of Plea," stated: "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Defendant initialed the box next to this statement. Defendant placed a notation of "n/a" and crossed out statements to the portions of the consequences of the plea that did not apply to him.

Defendant also signed and dated a statement reading: "I have read and understand this entire document. I waive and give up all of the rights that I have initialed. I accept this Plea Agreement." A similar signed and dated statement by defendant's attorney at the time defendant entered his plea stated: "I am the attorney for the defendant. I am satisfied that (1) the defendant understands his/her constitutional rights and understand[s] that a guilty plea would be a waiver of these rights; (2) the defendant has had an adequate opportunity to discuss his/her case with me, including any defenses he/she may have to

the charges; and (3) the defendant understands the consequences of his/her guilty plea. I join in the decision of the defendant to enter a guilty plea."

At the plea hearing on October 1, 2007, the following colloquy occurred between the trial court and defendant:

"THE COURT: In [case No. INF057130], [defendant], I have a plea form up here, your name at the top, and a series of initials and a signature on this form. [¶] Are these your initials and signature?

"THE DEFENDANT: Yes, sir.

"THE COURT: [Defendant], this tells me you've been advised of your rights. Do you understand the consequences of your plea; are you giving up, waiving your rights, and plead guilty to the sheet—that is, each of the charges listed on the sheet? Is that what you want to do today?

"THE DEFENDANT: Yes.

"THE COURT: By 'the sheet,' I mean the information filed in this case file stamped May 23, 2007. All right?

"THE DEFENDANT: Yes.

"THE COURT: [Defendant], have you had time enough to talk with your lawyer about this so you feel comfortable going forward?

"THE DEFENDANT: Yes, Your Honor."

Defendant argues that the trial court was required to clearly determine he read and understood all of the consequences of his plea, including the immigration consequences.

He acknowledges that the section 1016.5 advisements need not be given orally in open court. Defendant is correct. A written waiver form explaining immigration consequences can properly be used to effect the advisement required by section 1016.5. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522; *People v. Quesada*, *supra*, 230 Cal.App.3d at p. 536; cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 83 [trial court "may rely upon a defendant's validly executed waiver form as a proper substitute for a personal admonishment" with respect to losing right to appeal a sentence after pleading no contest].)

"[T]he legislative purpose of section 1016.5 is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met. [Citation.]" (*People v. Ramirez*, *supra*, 71 Cal.App.4th at p. 522.) "Nor need the statutory admonition be given orally. It is sufficient if, as here, the advice is recited in a plea form and the defendant and his counsel are questioned concerning that form to ensure that defendant actually reads and understands it." (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 536.)

The waiver form in this case contained the specific admonition about immigration consequences required by section 1016.5. Defendant initialed the box next to this

admonition, which noted he understood the immigration consequences, and he signed the statement at the end indicating he had read the form and understood it. Trial counsel also signed the statement asserting he was satisfied defendant understood his constitutional rights and the consequences of his guilty plea and that defendant had an adequate opportunity to discuss his case with counsel.

Defendant maintains that, even if a plea waiver form is generally a proper means of advising a defendant of immigration consequences, "[defendant's] initials on the plea form, without clear confirmation from the trial court that [defendant] read and understood the contents of the plea form, do not automatically signify compliance with section 1016.5 . . . ." However, the record belies this contention. The trial court here orally asked defendant whether he understood the consequences of his plea, whether he was giving up his rights as advised by his counsel, whether he had sufficient time to speak with his attorney, and whether he felt comfortable going forward with the plea. Defendant indicated that he understood and responded in the affirmative to the court's inquiry. The record here reflects that the trial court did conduct a sufficient inquiry into defendant's review and understanding of the change of plea form and the opportunity to discuss it with counsel. Although the trial court did not specifically state whether defendant read the contents of the plea form, the record supports the inference defendant had read and understood the entire contents of the plea form, including the immigration consequences of his plea.

Moreover, the trial court was not obligated to believe defendant's assertion he would have gone to trial had he been aware of the immigration consequences. (See *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 176 ["[T]o the extent appellant states in his written declaration that his understanding was different than what he said in court, the trial court impliedly disbelieved him when it denied the motion to set aside the plea. We are not free to disregard this implied finding that is supported by substantial evidence."].) (See *Zamudio, supra,* 23 Cal.4th at p. 210 [factual issues presented on a motion to vacate plea are to be resolved by trial court]; cf. *In re Alvernaz* (1992) 2 Cal.4th 924, 945 ["Petitioner has failed to establish a reasonable probability that, had he accurately been informed of his potential life sentence and prison confinement for 16 years and 7 1/2 months prior to parole, he would have accepted the plea bargain offered. Petitioner's statement in his most recent declaration that, had he been given adequate advice, he would have accepted the plea offer, is self-serving and thus insufficient in and of itself to establish prejudice."].)

We conclude the trial court did not abuse its discretion by denying defendant's motion to vacate his conviction under section 1016.5.

B. *Ineffective Assistance of Counsel*

Defendant also claims that he was deprived of effective assistance of counsel at the hearing on his motion to vacate because his counsel "failed to raise meritorious arguments on [his] behalf." Specifically, defendant argues that counsel was deficient in

correctly pointing out the law and made no effort to proffer facts relating to the taking of the plea.

To establish ineffective assistance of counsel, defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance was prejudicial, i.e., a reasonable probability exists that, but for counsel's performance, the result would have been more favorable to the defendant. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.)

As discussed above, the trial court properly denied defendant's motion to vacate his conviction under section 1016.5, so any further arguments or evidence on that ground by defense counsel would have been properly rejected by the trial court, and it is not ineffective assistance for counsel to refrain from raising meritless arguments. Moreover, as we have denied defendant's claim that the trial court abused its discretion in denying his motion to vacate, we necessarily conclude that counsel's alleged "deficient performance" caused no prejudice and cannot support a claim of ineffective assistance of counsel. (See *People v. Hart* (1999) 20 Cal.4th 546, 623-624, 85 Cal.Rptr.2d 132, 976 P.2d 683.)

III

DISPOSITION

The order denying defendant's motion to vacate the judgment under section 1016.5 is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.